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No. 00-497

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

DOLORES CLAY, as Administratrix of the Estate of KATHLEEN P. CLAY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS DOLORES CLAY AND JOHN D. STROM

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I. CLARIFICATION OF PETITIONER'S STATEMENT

Petitioner Ford Motor Company ("Ford") cloaks its dissatisfaction with an adverse jury verdict and affirmance in a conjured issue of general import. This Court has already established the standard under Rule 702 of the Federal Rules of Evidence for admitting expert testimony and directed that the district courts be given broad discretion to assess the reliability of such testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). Reaching to capture this Court's attention, Ford obscures the fact that the trial court exercised its discretion on a record establishing that: (1) Plaintiffs' expert relied on the results of vehicle tests performed by Ford's own engineers; (2) Ford never challenged the expert's principle that dynamics can be used to analyze vehicle designs and predict their motion; and (3) Ford waived its opportunity to conduct a voir dire examination of plaintiff's expert, declined the opportunity to question him about his areas of expertise before he testified, and elected to challenge the expert solely on cross-examination.

Faced with a record supporting the reliability of the expert's methodology and the trial court's admission of his testimony, Ford is left to urge that this Court find an abuse of discretion any time a trial judge fails to make specific findings on the record reflecting the extent of the *Daubert* analysis and detailing the reliability determination. This Court having held just last year that the trial court's discretion "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusions," *Kumho Tire*, 526 U.S. at 152, Respondents Dolores Clay and John D. Strom ("Plaintiffs") submit that the petition should be denied.

A. The Record, Which Included Tests By Ford's Own Engineers, Supported The Reliability Of Plaintiffs' Expert's Testimony That The Bronco II's Defective Design Caused The Fatal Roll.

1. The Fatal Roll Of The Bronco II

On June 18, 1995, 18-year-old Kati Clay and 26-year-old Chris Strom were killed when the Ford Bronco II in which they were riding rolled over on Interstate 77 in Akron, Ohio. C.A. App. at 979, 1067, 1069-73, 1080-82, 1087, 1089, 1090, 1092, 1094-98. According to Ford's statistical expert at trial, the two-wheel drive Bronco II has the second worst rollover rate of all sport utility vehicles ("SUV"). *Id.* at 1658-59.

The driver was William Slonsky. At 50 to 60 m.p.h., he executed a routine lane change to the right to avoid a vehicle approaching rapidly from the rear. He thereafter returned to the previous lane to avoid a slow moving vehicle. C.A. App. at 1071. When Slonsky made the lane change, the vehicle "overcorrected" itself and began to slide sideways. *Id.* at 1071-72. The vehicle then went up on two wheels, its passenger-side wheel rims gouged into the pavement and the vehicle began to roll. *Id.* The vehicle rolled two and three-quarters or three and three-quarters times, coming to rest on the driver's side about 235 feet from the end of the gouges. Pet. at 3a. Kati Clay and John Strom were both thrown from the Bronco II as it rolled. *Id.* Strom died on the scene from his injuries and Clay later died at a nearby hospital. *Id.*[1]

1. Attempting to deflect attention from the evidence of the Bronco II's defective design, Ford persists in mentioning passenger Sean Lance's use of LSD. There was no evidence that the *driver*, Slonsky, was on LSD or any other drug. *See* C.A. App. at 1102-03. Indeed, Slonsky's urinalysis following the accident produced negative results for alcohol and/or drugs. Pet. at 3a. In another feint, Ford refers to recent repairs to the Bronco II. There was no evidence, however, that recent repairs to the Bronco II had anything to do with the accident. C.A. App. at 1110.

2. The Bronco II's High Rollover Rate

At trial, Plaintiffs introduced testimony from Ford's engineers involved in the designing and testing of the Bronco II, as well as Ford's internal documents, statistics, test data and memoranda, to establish that the Bronco II's design defects caused its dangerous propensity to roll. *See, e.g.*, C.A. App. at 350-56, 368, 1155-65, 1658-60, 1185-89; Pet. at 38a-41a, 46a-47a. For example, Plaintiffs introduced an internal Ford document that listed the number of "first event rollovers" by SUV make and model. C.A. App. at 1139-43. A "first event" rollover is one not preceded by another collision. *Id.* at 1138. This June 23, 1988 document, entitled "Current Safety Issues Meeting with 'Red' Poling,"[2] which was based on federal Fatal Accident Reporting System ("FARS") statistics, demonstrated that the first-event rollover rate of the Bronco II was nearly three (3) times that of the Chevrolet S-10 Blazer. *Id.* at 361-67, 1139. Dr. Melvin Richardson, Plaintiffs' expert, testified regarding another Ford document that contained Ford's own internally-generated statistics and showed that the first-event rollover rate of the Bronco II was over three (3) times that of the Suzuki Samurai, about five (5) times that of the Chevrolet S-10 Blazer, and about ten (10) times that of the Jeep Cherokee. *Id.* at 1140.

Ford's statistical expert, Michelle Vogler, admitted that SUVs, among all classes of motor vehicles, have the highest rollover rates. C.A. App. at 1658-59. It was she who testified that the two-wheel drive Bronco II has the second worst rollover rate of all SUVs. *Id.* at 1658-59.[3] She added that, based on her

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2. In June 1988, Red Poling was the chief executive officer of Ford. C.A. App. at 1134.

3. Only the Isuzu Amigo has a rollover rate higher than that of the two-wheel drive Bronco II. C.A. App. at 1658.

examination of accident numbers from six states for an average period of 7.8 years, two- and four-wheel drive Bronco IIs were involved in 5,672 rollover accidents. *See id.* at 1654. She also testified that the Bronco II's rollover rate was twice that of the Chevrolet S-10 Blazer and four times that of the Jeep Cherokee. *See id.* at 1660.

3. Ford Chose A Lesser "Stability Index" For The Bronco II

According to Ford's veteran mechanical engineer, Fred Parrill, Ford recognized the need to improve the "stability index" of the Bronco II as early as February 5, 1981. C.A. App. at 1036, 1039.[4] Parrill testified unequivocally that stability index is an important indicator of a vehicle's safety:

> The vehicle dimensions or characteristics that make up the stability index are important vehicle characteristics that certainly can have an effect on the vehicle's performance.
>
> There is a directional relationship between the stability index and rollover propensity of a vehicle. The higher the stability index, there will be less of a rollover propensity.

C.A. App. at 1038-39.

Parrill noted that a February 5, 1981 Ford report had articulated a goal of raising the Bronco II's stability index " 'from 1.85 to a maximum achievable of 2.25 without a totally new concept vehicle.' " C.A. App. at 332, 1039. Ford's

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4. "Stability index is a ratio involving the track width of the vehicle and the height of the [vehicle's] center of gravity." C.A. App. at 1038. "Track width" is the distance between the front wheels of a vehicle, measured from the center of each wheel. *See id.* at 1042-43.

engineers advanced five proposals to improve the stability index. *Id.* at 332, 1039-40. Ford chose the second proposal, which marginally raised the stability index from 1.85 to 1.98 or 2.03, even though Proposals Three through Five yielded a higher stability index. *Id.* at 1040-41. Ford's engineers considered that the higher stability index of 2.25 was achievable. *Id.* at 1039-41. Ford chose to pursue the lower stability index.

4. Ford's Choice Was Driven By Its Production Target Date

Parrill stated that Ford chose Proposal Two to avoid a delay in the so-called "Job One" date (mass production target date): "Proposals One and Two would not [have] affected the timing of Job One[;] however, proposals Three, Four and Five involved widening the vehicle track and lowering the center of gravity and would have involved significant vehicle tear-up and a potential delay in achieving the Job One date." C.A. App. at 332, 1039-40.[5] Changing it would have "major or significant consequences." *Id.* at 1038.

Ford established the January 1983 Job One date with knowledge that Chevrolet intended to produce the S-10 Blazer by 1982. C.A. App. at 1037. Another Ford engineer, James McClure, who was responsible for the ride and handling aspects of the Bronco II's development, testified that the decision to increase the track width by three to four inches "would most likely cause a delay in Job One and Ford knew that Chevy was coming out with the S-10 Blazer in the early fall of 1982." *Id.* at 1051. McClure explained that widening the Bronco II would require alterations to the vehicle's sheet metal, "and the

5. Parrill also quoted from a Ford interoffice memorandum which stated that " '[t]he program cost, weight and investment status would almost certainly increase' " if the decision were made to widen the Bronco II. C.A. App. at 1042-43.

lead time for the changes in the sheet metal design was at least one year." *Id.* at 1050.[6] Increasing the Bronco II's track width by two inches also would have required modification of the vehicle's axles. *Id.* at 1053.

McClure further testified that, from March 1982 through May 1982, Ford's engineers on three or four occasions "recommended at least a two-inch track width increase for the Bronco II." C.A. App. at 349, 1051. In March 1982, the suspension and steering design departments reported that the Bronco II contained " '[c]ritical handling problems.' " *Id.* at 349, 1051. Improvement of the Bronco II's stability was the sole reason for the proposals by Ford's engineers to widen the Bronco II's track width. *Id.* at 1053. "Management considered the request [for a two-inch track width increase] but the changes were not made." *Id.* at 1051. As to handling, Ford's engineers concluded that the prototype Bronco II's handling characteristics " '[r]equire[d] improvements in directional stability, *lane changes*, *roll control* and cornering.' " *Id.* at 347-48, 1040 (emphasis added).

5. Ford Halted Driver Testing Of Bronco II "J-Turns"

Ford halted "J-turn" testing of the Bronco II in 1982 out of concern for the safety of Ford's test drivers. C.A. App. at 1049-50.[7] This concern stemmed from an incident in which a Bronco

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6. Another reason for Ford's decision not to widen the Bronco II was its "desire to keep the vehicle narrow in order to be able to market the Bronco II in Japan." C.A. App. at 1050-51.

7. McClure testified that "J-turn" testing involves driving a vehicle on a test track at a given speed, then turning the steering wheel a predetermined amount (e.g., 360 degrees) and holding the wheel at that point. C.A. at 1057. Outrigger contact will not occur unless at least one wheel lifts off the ground. *Id.* at 1041. Mr. Parrill testified that outriggers are devices installed on vehicles "to allow the test drivers to test the limits of the vehicles within test parameters and to prevent the vehicle from actually rolling over." *Id.* at 1041-42.

II rode up on two wheels, the outrigger failed and dug into the road, and the Bronco II "[p]ole vaulted . . . over." *Id.* at 1049-50. Parrill testified that "[t]he tests were to determine what effects wheel size, spring rates, tire type and size, et cetera, had on the Bronco II during J-turn maneuvers. The results were that outrigger contact occurred on every test run at speeds over 25 miles an hour." *Id.* at 350-56, 1041.

Ford conducted no more J-turn testing with human drivers on road surfaces from April or May 1982 to the inception of production. C.A. App. at 1043.[8] Instead, it used computer model testing with no one at risk. *Id.* at 1043-44. To Parrill's knowledge, no automaker had ever before used computer modeling and testing "for sign-off testing purposes." *Id.* at 1044. McClure agreed that the Bronco II program was the first to use computer modeling and testing in place of road testing to evaluate rollover stability. *Id.* at 1059-60.

6. Ford Used Lead Shot Instead Of Crash Test Dummies

In a video prepared for use in defending product liability cases, Ford used lead shot in the demonstrations instead of crash test dummies to simulate passengers. C.A. App. at 1062.[9] McClure admitted that the placement of 150 pounds of shot in the right front floorboard area in place of crash test dummies did not fairly characterize the positioning of a human being seated in the right front seat. *Id.* at 1055. McClure also stated

8. In fact, McClure testified that Ford subjected the Bronco II to J-turn testing through May 1982 (at which time, as noted above, concerns over driver safety caused a halt), then did not resume such testing until May 1989. C.A. App. at 1049.

9. During questioning regarding J-turn testing, McClure conceded that Ford had available to it, but failed to use, crash test dummies which could have simulated the weight and position of actual passengers. C.A. App. at 1055.

that the Bronco II's center of gravity was above its floorboards, and conceded that the placement of shot bags on the floorboards loaded the Bronco II below its center of gravity. *Id.* at 1056. Plaintiffs' engineering expert, Dr. Melvin Richardson, made clear the profound impact that altering the center of gravity had on the validity of the testing: "If people are placed in the vehicle they'll sit higher than this load is, and the vehicle will be *much more likely* to roll over with people in it than it would be if it were loaded this way." *Id.* at 1200-01 (emphasis added).

7. Ford Chose Not To Decrease Wheel Size Or Increase Track Width

Parrill testified that one of the conclusions in an April 28, 1982 engineering report was that " '[a] significant improvement in J-turn handling can be achieved on the Bronco II by releasing [the vehicle with] 14-inch wheels or increasing track width three to four inches.' " C.A. App. at 1042. Nevertheless, "[t]he Bronco II was produced and sold with 15-inch wheels and the track width was never increased three to four inches," notwithstanding the technical feasibility of these improvements. *Id.* at 1042.[10] No significant changes were made to the length, center of gravity, or width of the Bronco II prototype from the time of the April 1982 engineering report to the time production of the Bronco II commenced. *Id.* at 1043. The changes to the Bronco II prototype during this period were "cosmetic." *Id.* at 1044-45.[11]

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10. Another Ford report evaluating the Bronco II's handling reiterated that 14-inch wheels significantly improved the Bronco II's handling. C.A. App. at 350. Dr. Richardson testified (as Parrill did) that Ford never sold the Bronco II with anything other than 15-inch wheels. *Id.* at 1166.

11. McClure testified, for example, that Ford increased the capacity of the gasoline tank from 17 to 23 gallons and added skid plates beneath the transfer case and the gasoline tank. C.A. App. at 1059.

8. Ford's Choice Of The Twin I-Beam Suspension Reduced The Bronco II's Stability

Ford chose a "Twin I-beam" suspension for the Bronco II. C.A. App. at 1143.[12] Dr. Richardson testified that such a suspension has a "fairly high roll center." C.A. App. at 1147-48. A consequence of Ford's choice of suspension is a dynamic problem known as "jacking" that exacerbates the low stability index. The phrase describes a phenomenon in which the Bronco II actually becomes taller and narrower in certain turning maneuvers. *Id.* at 1147-48. In a small vehicle, the problem can become "a very serious and significant problem." *Id.* at 1149. Ford could have chosen, but did not choose, the SLA or the McPherson strut suspensions, which do not have the jacking problems associated with the Twin I-beam. *Id.*

Ford's own test documents confirm the problem known as "jacking." One, entitled "Investigation into 'Jacking Effect' on front swing axle using '88/'89 Bronco II vehicles [a]s it relates to vehicle rollover," reflected tests by Ford on a production-level Bronco II in which jacking produced a 40 millimeter decrease in track width and a 25 to 26 millimeter height increase in the center of gravity. C.A. App. at 368, 1185-86. Another Ford study, based on actual comparison testing, concluded that the production-level Bronco II suffered from jacking measured at *ten times* that of the Chevrolet S-10 Blazer. *Id.* at 371, 1187-89.

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12. McClure testified that "[t]he Twin I-beam was another of the package constraints that Ford management provided to the engineers as a hard point for the vehicle." C.A. App. at 1060. A "hard point" was a proposed design feature of the Bronco II that Ford was unwilling to alter. *Id.* McClure testified further that the Twin I-beam "hard point" worsened the Bronco II's stability index. *Id.*

William Slonsky, the driver of the Bronco II in the present case, confirmed what Ford's engineers were saying in 1982:

* * *

A. When I made this lane change I felt something go wrong with the handling of the vehicle, and I went to correct it, and the car overcorrected itself. I tried to maintain control of the car, I could not and the car started to roll. . . .

Q. When you felt that the car was mishandling and you overcorrected, can you explain to the jury what you mean by that?

A. The car seemed to be completely off balance. I couldn't find — I couldn't find a way to stabilize the vehicle.

Q. What happened after the overcorrection?

A. The vehicle went on two wheels and started to roll towards the passenger's side.

C.A. App. at 1071-72. The testimony of Lisa Samshak Dunlap, the driver of a vehicle behind the Bronco II and an eyewitness to the accident, corroborated Mr. Slonsky's description of how the accident occurred. *Compare* C.A. App. at 1071-72 *with* C.A. App. at 1093-99.

9. Using Ford's Test Data, Dr. Richardson Arrived At The Same Conclusions As The Ford Engineers Who Designed The Bronco II

In addition to Ford's internal memoranda, test data, and the testimony of Ford engineers, Plaintiffs also introduced the testimony of Melvin Richardson, Ph.D. Pet. at 6a. The district court found that Dr. Richardson was qualified to testify as an expert on the subjects of mechanical engineering, machine design, vehicle dynamics and accident reconstruction. *Id.* Dr. Richardson opined that defects in the design of the Bronco II caused the vehicle in this case to roll during Slonsky's lane change. *Id.* at 7a-8a.

Dr. Richardson was a professor of mechanical engineering at Clemson University for twenty years, from 1965 to 1985. Pet. at 6a. During that time, Dr. Richardson taught mechanical engineering, machine design, machine dynamics and stress analysis. *Id.* Dr. Richardson received his Bachelor's Degree from Clemson in mechanical engineering in 1957, his Master's Degree from North Carolina State in mechanical engineering, with an emphasis in machine design, and his Doctorate from the University of Alabama in engineering mechanics in 1965. *Id.* Dr. Richardson also earned a Master's Degree in applied mathematics from the University of Alabama. *Id.* Since 1985, Dr. Richardson has worked full-time as an engineering consultant in the areas of accident reconstruction and machine design, and "[o]n a couple of occasions" has even consulted for Ford Motor Company itself. *Id.* at 6a-7a. Although Dr. Richardson has never published an article on vehicle handling and stability, he has made presentations on those topics in the past. *Id.* at 7a.

At trial, Dr. Richardson testified that dynamics — or the analysis of the forces that produce motion in objects — can be used to analyze vehicular accidents and that accident

reconstruction is simply an application of dynamics to a particular set of facts. Pet. at 7a. To reconstruct vehicular accidents, Dr. Richardson assesses the physical and factual information available to him, applies standard engineering principles to this information and determines the most probable sequence of events. *Id.* at 7a. In the present case, Dr. Richardson reviewed, as did Ford's expert, the police accident report, witness depositions, witness statements, and photographs of the accident scene, and visited the accident site. *Id.* at 8a. Dr. Richardson also reviewed Ford's internal memoranda and extensive design and test data for the Bronco II. *Id.* at 23a, 46a.

Relying on tests performed by Ford's own engineers, Dr. Richardson testified that the Bronco II in this case turned sideways and began to roll because of certain handling and stability defects. *See* Pet. at 7a. First, Dr. Richardson criticized the Bronco II's stability index as too low. *Id.* at 7a, 38a-41a. This conclusion echoed that of Ford engineer Fred Parrill who testified that a vehicle's stability index directly affects a vehicle's performance and its propensity to roll. C.A. App. at 1038-39. Parrill further testified that, in a February 5, 1981 report (relied upon by Dr. Richardson in forming his opinion, *see id.* at 1155-60), the Ford engineers who designed the Bronco II had advocated several feasible alternatives for increasing the Bronco II's stability index. *Id.* at 332, 1039.

Second, Dr. Richardson testified that a rear stabilizer bar on the Bronco II caused "oversteer," which is characterized by a sliding out of the rear of the vehicle in a turn. Pet. at 7a. Again, Dr. Richardson testified that, in forming this conclusion, he had relied in part on a Ford engineering report dated April 28, 1982 that warned that "[a] rear stabilizer is detrimental to handling in a released level configuration . . ." C.A. App. at 1160-65.

Third, Dr. Richardson testified that the design of the Bronco II's twin I-beam suspension caused the vehicle's "jacking." Pet. at 7a. Dr. Richardson explained that, in a hard turn, the Bronco II's suspension will cause the front end of the vehicle to rise and the track width to decrease, making the vehicle taller and narrower and elevating the center of gravity. *Id.* In arriving at his conclusions on the Bronco II's "jacking," Dr. Richardson relied in part on Ford's own internal study titled "Investigation into 'Jacking Effect,' " in which Ford found that the suspension chosen for the production-level Bronco II caused a decrease in the vehicle's track width and an increase in the center of gravity of the vehicle, whereas jacking rarely occurred with the suspensions used by Ford on other vehicles. *See* C.A. App. at 368, 1185-86. Another Ford study relied upon by Dr. Richardson — based on comparison testing between sport utility vehicles — concluded that the production-level Bronco II suffered from jacking measured at ten times that of the Chevrolet S-10 Blazer. *Id.* at 371, 1187-89.

B. The District Court Considered And Rejected Ford's Challenges To The Admissibility Of Dr. Richardson's Testimony.

Ford waited until the week before trial to move for the exclusion of Dr. Richardson's testimony and to request that the district court hold a hearing on the admissibility of that testimony. As the principal basis for its motion, Ford made the curious argument that Dr. Richardson's testimony was unreliable because it was based on Ford's internal documents and test data and had not been independently tested by Dr. Richardson. *See* Pet. at 4a, 30a. Because Ford's motion was predicated on a ruling made nearly three months earlier by another federal district court, and Ford had shown no good cause for its delay in filing until the week before trial, the district court denied Ford's request for a preliminary hearing. *Id.* at 4a.

Having been alerted to Ford's objections, however, the district court stated that it might allow a voir dire of Dr. Richardson before he testified. *Id.* at 4a, 30a.

When Plaintiffs moved to have Dr. Richardson qualified as an expert at trial, the district court offered Ford's counsel an opportunity to conduct a voir dire examination of Dr. Richardson. *See* Pet. at 6a n.4, 31a-34a. Ford's counsel declined the opportunity to conduct voir dire, choosing instead to question Dr. Richardson as to specific topics on cross-examination. *Id.* at 31a. The district court again offered Ford's counsel an opportunity to question Dr. Richardson generally as to his areas of expertise, but Ford's counsel again declined, electing to make foundational objections only. *Id.* at 4a n.4, 32a. The district court then granted Ford a "continuing objection" to Dr. Richardson's ability to express opinions on accident reconstruction. *Id.* at 32a-34a. At the close of Plaintiffs' case, Ford orally moved to strike Dr. Richardson's testimony as unreliable, but the district court denied Ford's motion. *Id.* at 34a.

Finally, after the jury found that the Bronco II's design was defective, Ford argued in its motion for judgment as a matter of law that Dr. Richardson's testimony should have been excluded under *Daubert* because there was a "lack of foundation" for his opinions. C.A. App. at 833; *see* Pet. at 38a. In its opinion denying Ford's motion, the district court noted that, even without considering Dr. Richardson's testimony at all, the jury could have found that the Bronco II was defective based upon Ford's own test data, documents and the testimony of its engineers. Pet. at 38a. Moreover, the district court rejected Ford's attacks on Dr. Richardson's interpretation of, and reliance on, Ford's internal memoranda and tests in reaching his opinions. *Id.* at 46a. Specifically, the district court noted that a "significant portion" of the Ford engineers' " 'extensive

testimony' . . . supported the Plaintiffs' position." *Id.* at 46a. If Ford sought independent testing and verification of Dr. Richardson's theories, its own test data and the conclusions of its engineers provided that verification. *See id.* at 46a. Accordingly, the district court denied Ford's motion for judgment as a matter of law. *Id.* at 46a-47a.

C. The Sixth Circuit Held That The District Court Did Not Abuse Its Discretion In Finding Dr. Richardson's Testimony Reliable

On appeal, Ford once again challenged the admission of Dr. Richardson's testimony, arguing that the district court had abused its discretion in permitting Dr. Richardson to opine in this case. The Sixth Circuit disagreed. Noting the district court's "general gatekeeping obligation" under *Daubert* and *Kumho Tire*, Pet. at 5a, the Sixth Circuit reviewed the record to determine, first, whether the district court had assessed the reliability of Dr. Richardson's testimony and, second, whether the district court abused its discretion in finding the testimony to be reliable. *Id.* at 9a.

After "review[ing] the record in detail," Pet. at 9a, the Sixth Circuit concluded:

> Although the district court did not explicitly recite that Richardson's testimony was relevant and reliable, its rulings indicate that it made that determination. Ford's motion *in limine* squarely raised the issue of reliability. Ford made a variety of objections throughout Richardson's testimony, including a continuing objection to his ability to offer opinion with respect to accident reconstruction, and at the conclusion of the appellees' case, Ford moved to strike Richardson's testimony in its entirety. We

> conclude, based on the district court's rulings on the motions and objections, that the court determined Richardson's testimony was relevant and reliable.

Pet. at 5a. Continuing, the Sixth Circuit examined Dr. Richardson's investigation and his analysis of Ford's internal memoranda and test data, and noted that Ford's engineering experts had employed nearly identical investigations. *Id.* at 5a-8a. The Sixth Circuit noted that Ford had advanced several vague objections to perceived weaknesses in Dr. Richardson's investigation, but failed to show how any of the supposed weaknesses undermined Dr. Richardson's methodology or rendered his testimony unreliable. *Id.* at 8a. Indeed, the Sixth Circuit noted that Ford did not challenge the principle that dynamics can be used to analyze vehicle design and predict their motion. *Id.*

After a meticulous review of the record, the Sixth Circuit concluded that the district court had not abused its discretion in finding that Dr. Richardson's testimony was reliable. Pet. at 8a-9a. Because Dr. Richardson's testimony was properly admitted, the appellate court observed that Ford's criticisms went solely to the weight to be accorded his testimony by the jury. *Id.* at 8a (citing *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.")).

II. REASONS FOR DENYING THE WRIT

Ford's petition should be denied because the rigid and formalistic inquiry espoused by Ford runs counter to this Court's established precedent and eviscerates the discretion critical to a trial court's admissibility determinations. Although Ford purports to advocate the positions of the Seventh, Tenth and Eleventh Circuits, none of those courts have held that a district court must make detailed findings on the record as to the *Daubert* factors, other factors that may be of relevance, and the relative weight to be given to each. Indeed, Ford's proposed standard would mandate the reversal of several of the circuit court decisions Ford professes to support.

Like the Sixth Circuit, the circuit courts cited in Ford's petition do not require a district court's recital of the *Daubert* factors. *See, e.g., Ancho v. Pentek Corp.*, 157 F.3d 512, 518 (7th Cir. 1998). Rather, those courts scrutinize the lower court's record to satisfy themselves that the district court has made an assessment of the expert's reliability and that the assessment was reasonable. That is precisely what the Sixth Circuit did in this case. Because there is no conflict among the circuits for this Court's resolution, and because Ford would have this Court compromise the broad latitude it afforded trial courts just last year in *Kumho Tire*, the petition should be denied.

A. The Sixth Circuit's Decision Is In Accord With *Daubert* And *Kumho Tire* And The Circuit Court Decisions Cited In The Petition

1. The Sixth Circuit's Decision Satisfies *Daubert* And *Kumho Tire*.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 584-93, 594-95 (1993), this Court held that, pursuant to Rule 702 of the Federal Rules of Evidence, a district court must act as a gatekeeper to ensure that expert testimony admitted into evidence is both relevant to the issues in the case and reliable. Declining to enumerate all of the factors that a district court might consider in assessing the reliability of an expert's testimony, this Court stated:

> We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. . . .

509 U.S. at 592-93. Continuing, the Court explained:

> The inquiry envisioned by [Federal] Rule [of Evidence] 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity — and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Daubert, 509 U.S. at 594-95.

Subsequently, in *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999), the Court held that the general gatekeeping obligations set forth in *Daubert* apply to all expert testimony considered by a district court, including testimony based on

technical and other specialized knowledge. The Court also emphasized that the particular factors enumerated in *Daubert* for assessing an expert's testimony — testing, peer review and publication, potential rate of error, and general acceptance of the relevant scientific community — were "made to be helpful, not definitive" and "do not all necessarily apply even in every instance in which the reliability of scientific testimony is challenged." *Kumho Tire,* 526 U.S. at 151. Indeed, the Court stated that "the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony. . . ." *Kumho Tire*, 526 U.S. at 152. Accordingly, the Court held that an abuse-of-discretion standard "applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion. Otherwise, the trial judge would lack the discretionary authority needed. . . ." *Id*; *see id.* at 153 ("[W]hether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.").

In this case, the Sixth Circuit heeded the Court's dictates in *Daubert* and *Kumho Tire* and accorded the district court the appropriate deference to assess the relevance and reliability of Dr. Richardson's testimony. Noting that a formal hearing is not required by *Daubert*, and that Ford had declined its opportunities to voir dire Dr. Richardson and to question him at the outset of his testimony, the Sixth Circuit examined the district court's rulings on the issue of reliability throughout the trial and in its written opinions. Pet. at 4a-9a. Observing that the district court had ruled upon the reliability issue each time it was raised by Ford and that the court was careful to preserve each of Ford's objections for appellate review, the Sixth Circuit

concluded that the district court had indeed considered the reliability of Dr. Richardson's testimony.[13] *Id.* at 5a. Moreover, after reviewing the record itself, and the similarities in investigation and methodology employed by Ford's own experts, the Sixth Circuit held that the district court had not abused its discretion in finding Dr. Richardson's testimony reliable. *Id.* at 34a.

The district court fulfilled its gatekeeping obligations in accordance with *Daubert* and *Kumho Tire*, and the Sixth Circuit correctly affirmed. The petition should be denied.

2. The Sixth Circuit's Decision Does Not Conflict With The Circuit Court Decisions Cited By Ford.

Contrary to Ford's assertion, the Sixth Circuit's decision does not conflict with the circuit court cases cited by Ford in its petition. Accordingly, there is no significant question for this Court's resolution.

As a threshold matter, the circuit courts uniformly agree that a district court has an obligation as "gatekeeper" to assess the relevance and reliability of an expert's testimony. *See* Pet. at 4a-5a; *Goebel v. Denver and Rio Grande Western R.R. Co.*, 215 F.3d 1083, 1087 (10th Cir. 2000); *United States v. Velarde*, 214 F.3d 1204, 1208 (10th Cir. 2000); *United States v. Lee*, 25 F.3d 997, 998 (11th Cir. 1994); *Ancho v. Pentek Corp.*,

13. If, as Ford suggests, the district court had actually rejected the application of *Daubert* to Dr. Richardson's testimony, then surely it would not have permitted Ford repeated opportunities to voir dire Dr. Richardson, to question him generally as to his areas of expertise, to maintain a continuing objection to his testimony under *Daubert*, or to establish its record for purposes of appeal. If the district court believed that *Daubert* were inapplicable, it simply would have denied Ford's motion *in limine* at the outset and then refused Ford additional opportunities to contest the admissibility of the testimony under *Daubert*.

157 F.3d 512, 515 (7th Cir. 1998). The circuits also agree that a district court need not hold a formal hearing to fulfill this obligation and can, instead, perform this role "when asked to rule on a motion *in limine*, on an objection during trial, or on a post-trial motion. . . ." *Goebel*, 215 F.3d at 1087 (citing *Daubert*, 509 U.S. at 597); *see also* Pet. at 5a. Further, the circuit courts agree that, in order to survive appellate scrutiny, a district court must ensure that there is a "sufficiently developed record" to demonstrate that it performed its gatekeeping function and concluded that the expert's "testimony both rests on a reliable foundation and is relevant to the task at hand . . ." *Goebel*, 215 F.3d at 1087, 1088 (citations and quotations omitted); *see also* Pet. at 5a (noting that, in the absence of a *Daubert* hearing, an appellate court " 'must review the record to determine whether the district court erred in its assessment of the relevance and reliability of the expert testimony' ") (quoting *Greenwell v. Boatwright*, 184 F.3d 492, 498 (6th Cir. 1999)).

As for the extent to which a district court must detail its gatekeeping analysis for an appellate court's review, there is no circuit split for this Court's resolution because only the Tenth Circuit has expressed an opinion on the issue and, even then, the reach of its holding is uncertain. For example, the Tenth Circuit has stated that a district court "must adequately demonstrate by specific findings on the record that it has performed its duty as gatekeeper." *Goebel*, 215 F.3d at 1088. Whether this statement requires the district court to make explicit findings as to each of the four *Daubert* factors, other factors that may be of relevance, or the relative weight to be given to each — as Ford urges, *see* Pet. at 20 — has not yet been considered by the Tenth Circuit. *See Goebel*, 215 F.3d at 1088; *see also United States v. Velarde*, 214 F.3d 1204, 1210 (10th Cir. 2000) ("We did not specify that any particular type of reliability determination must be made. However, some such

reliability determination must be apparent from the record. The trial court's 'evidentiary decisions do not warrant reversal if it determined, ***in some apparent manner***, that the expert testimony admitted was reliable.' ") (emphasis added) (citation omitted).[14]

Although the *Goebel* court stated that a district court must make findings on the record to indicate "that it has performed its duty as gatekeeper," it explained that the district court "need not 'recite the *Daubert* standard . . .' or apply all of the

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14. Unlike in *Goebel*, the reliability determination here is apparent from the record. The district court not only ruled on all *Daubert* objections and motions characterizing the expert testimony as "junk science," it had the results of the underlying tests and data from Ford's own engineers upon which Dr. Richardson relied. *See, e.g.*, C.A. App. at 350-56, 1658-60; Pet. at 38a-41a, 46a-47a. There was no such evidence in *Goebel*. Further, as the Sixth Circuit noted, and again as distinguishable from *Goebel*, Ford did not challenge Dr. Richardson's fundamental principle that dynamics can be used to analyze vehicle designs and predict their motion. Pet. at 8a.

In further contrast with the present case, the district court in *Goebel* apparently gave no indication that it ever performed a *Daubert* analysis or that it actually considered objections raised to the expert testimony. Rather than presenting the objecting party with a forum and full opportunity to challenge the relevance and reliability of the expert's testimony at the outset, and then to articulate and have addressed specific objections to each discrete subject on which the expert opined, the district court simply denied without comment the objecting party's motion *in limine* and made the vague assurance that all relevant objections had been "fully considered." *Goebel*, 215 F.3d at 1088. On appeal, the Tenth Circuit stated that it could not determine "whether the district court was referring to the professional credentials of the witness . . . [or] the reasoning and methodology relied upon by the witness" when the district court stated that it had "fully considered the matter." *Id.* at 1088. On the basis of such a sparse record, the Tenth Circuit held that it could not determine whether the district court had indeed considered the reliability of the testimony and, thus, remanded the case to the district court for a new trial. *Id.* at 1089.

reliability factors suggested in *Daubert* and *Kumho*." *Goebel*, 215 F.3d at 1088 (quoting *Ancho*, 157 F.3d at 518). Emphasizing that the gatekeeper inquiry must remain "flexible," the Tenth Circuit concluded that, so long as the district court "adequately demonstrate[s]" that it has performed its function as gatekeeper, the district court's decision should be affirmed. *Goebel*, 215 F.3d at 1088. Considering the Tenth Circuit's reliance on *Ancho*, discussed *infra*, the Tenth Circuit could not have intended to require the sort of extensive findings and explanatory narrative advocated by Ford. *See Goebel*, 215 F.3d at 1088 (citing *Ancho*, 157 F.3d at 516-18).

Moreover, none of the other circuit courts — including the Sixth Circuit — has stated the extent to which the district court must document its gatekeeping analysis in order to survive appellate review. In fact, in *Ancho*, the Seventh Circuit affirmed the district court's admissibility determination even though the district judge "did not specifically mention the four [*Daubert*] guideposts used to assess the reliability and validity of an expert's methodology." 157 F.3d at 517. Although the Seventh Circuit stated that it would have been "helpful" if the trial judge had articulated in detail his application of *Daubert*, it nevertheless concluded that "when the trial judge's decision is read in totality, . . . it [is] sufficiently clear that he very definitely relied on the *Daubert* standard when rendering his oral ruling." *Id.* at 517-18. Similarly, the Eleventh Circuit has established no rule requiring the district court to make detailed findings as to its application of *Daubert* and, instead, simply "encourage[s]" that findings be made to facilitate appellate review. *See United States v. Lee*, 25 F.3d 997, 999 (11th Cir. 1994).

The Sixth Circuit's decision in the present case similarly expresses no opinion as to the extent to which a district court must document its *Daubert* analysis on the record. Just as the other circuits do, however, the Sixth Circuit reviews the record

in its totality to ensure that the district court performed its gatekeeping function and that its assessment of reliability was reasonable. In the present case, rather than simply "infer[ring]" that the district court had faithfully performed its gatekeeping function — as Ford accuses, *see* Pet. at 11, 15 — the Sixth Circuit scrutinized the district court record to ensure that an assessment of reliability was made and that the assessment was reasonable. *Id.* at 5a. Moreover, the Sixth Circuit noted that the district court offered Ford's counsel the opportunity to conduct voir dire of Dr. Richardson at the outset of his testimony and then to question Dr. Richardson generally as to his areas of expertise. *Id.* at 6a n.4 Ford's counsel, however, declined both opportunities, choosing instead to make foundational objections and to challenge the reliability of Dr. Richardson's testimony on cross-examination. *Id.*

After examining the district court's rulings on the specific motions and objections made to the expert's testimony, the Sixth Circuit concluded that the district court had considered Ford's objections, ruled on the record as to each of the discrete objections made, and properly found that "Richardson's testimony was relevant and reliable." Pet. at 5a. As in *Ancho*, the Sixth Circuit reviewed the record in its totality and found to its satisfaction that the district court understood its obligation under *Daubert* to assess the reliability of Dr. Richardson's testimony and that the district court did, in fact, do so. *Id.* at 5a. Because the Sixth Circuit's decision does not conflict with the decisions of the other circuit courts identified in Ford's petition, there is no circuit split for this Court's resolution. The petition should be denied.

3. Ford's Proposed Requirement That All District Courts Recite Specific Findings On The Record Reflecting The Extent Of Their *Daubert* Analyses And Detailing Their Reliability Determinations Is Contrary To The Flexible Inquiry Established By This Court In *Daubert* And *Kumho Tire.*

Contrary to the "flexible" inquiry envisioned by this Court in *Daubert* and *Kumho Tire*, Ford appears to argue in its petition that a district court should be required:

> to make factual findings concerning how the expert actually conducted the underlying evaluation, what sources of data were relied upon, . . . what reasoning was used in forming conclusions . . . which of the *Daubert* reliability factors are pertinent, what other indicia of reliability or unreliability are present, whether the pertinent *Daubert* or other factors are satisfied, and how much weight should be given to each factor.

Pet. at 20.

In essence, Ford urges this Court to adopt the type of "definitive checklist or test" that this Court rejected first in *Daubert* and again in *Kumho Tire*. *See Daubert*, 509 U.S. at 593, 594-95 ("We are confident that federal judges possess the capacity to undertake this review. Many factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. . . . The inquiry envisioned by [Federal] Rule [of Evidence] 702 is, we emphasize, a flexible one."); *Kumho Tire*, 526 U.S. at 152 ("The trial court must have the same kind of latitude in deciding how to test an expert's reliability . . . as it enjoys when it decides whether or not that expert's relevant testimony is reliable"). Similarly, Ford's

suggested checklist runs counter to the circuit decisions cited in Ford's petition. *See Ancho*, 157 F.3d at 518 ("Trial judges need only follow (i.e. adhere to) *Daubert* when making a Fed. R. Evid. 702 determination, [citation omitted]; they are not required to recite the *Daubert* standard as though it were some magical incantation."); *Velarde*, 214 F.3d at 1208-09 ("The trial judge enjoys equally broad discretion in both deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability.") (citations omitted).

Requiring a district court to conduct a formalistic and mechanical analysis of each of the *Daubert* factors — even if only to state the irrelevance of a factor to the analysis — threatens to compel numerous reversals for purely technical "errors" in following Ford's checklist, to spawn unnecessary reliability determinations within the context of any trial and to lengthen the proceedings in the district courts. *See Kumho Tire*, 526 U.S. at 152 (trial judge must have discretionary authority "to avoid unnecessary 'reliability' proceedings. . . . Indeed, the Rules seek to avoid 'unjustifiable expense and delay' as part of their search for 'truth' and the 'jus[t] determin[ation]' of proceedings.") (quoting Fed. R. Evid. 102). Indeed, Ford's suggested checklist analysis would mandate the reversal of several of the authorities cited approvingly by Ford in its petition. *See, e.g.*, *Ancho*, 157 F.3d at 518 (affirming district court's admissibility determination even though the district court made no mention of the specific *Daubert* factors) ("[W]hen the trial judge's decision is read in totality, we deem it to be sufficiently clear that [the district court] very definitely relied on the *Daubert* standard when rendering his oral ruling. Furthermore, we all understand that oral rulings are not as formalistic, definitive, and specific as written ones."). Because Ford's proposed standard is contrary to the flexible inquiry espoused by this Court and the circuit courts, the petition should be denied.

B. The Sixth Circuit Did Not Yield A Judicial Determination To The Jury; It Followed *Kumho Tire* In According The Trial Court Discretion To Determine Whether A Particular *Daubert* Factor Was A Reasonable Measure Of Reliability.

Ford's second purported reason for this Court's review is no more compelling than the first. While Ford remains impaled on the absence of independent vehicle testing by Dr. Richardson, it ignores, or simply fails to acknowledge that: (1) under *Kumho Tire*, a district court possesses discretion to determine *which* of the *Daubert* factors are appropriate measures of reliability; (2) the record is replete with Ford's own testing upon which Dr. Richardson relied; and (3) Ford faults Dr. Richardson for failing to conduct his own vehicle tests after Ford ceased its own testing in 1982 out of concern for the safety of Ford's test drivers. *See Kumho Tire*, 526 U.S. at 153; C.A. App. at 350-56, 368, 1049-50, 1155-65, 1185-89, 1658-60; Pet. at 38a-41a, 46a-47a.

Consistent with *Kumho Tire*, the Sixth Circuit noted that a district court possesses discretion to determine *which* of the *Daubert* factors are appropriate measures of the reliability — and, thus, the admissibility — of an expert's testimony in a given case. Pet. at 5a; *Kumho Tire*, 526 U.S. at 153 ("Thus, whether *Daubert*'s specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine."). Here, Ford's entire argument rests on the assumption that Dr. Richardson's alleged failure to test his theories [15] *was* critical

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15. The fact that Dr. Richardson relied on tests performed by Ford's own engineers, rather than recreating those tests himself, does not mean that Dr. Richardson's theories have never been tested. Ford ought not be heard to challenge the reliability and validity of its own internal testing records or the conclusions that can be drawn therefrom.

to the admissibility determination in this case. Neither the district court, nor the Sixth Circuit, so held. In fact, the district court dismissed Ford's attack on Dr. Richardson's failure to conduct independent testing because Dr. Richardson relied principally on Ford's own test data and internal documents in formulating his conclusions, and because the conclusions he drew from those documents were supported by the " 'extensive testimony' of Ford's own engineers. . . ." Pet. at 46a.

Only Ford's tortured reading of the Sixth Circuit's opinion, then, could produce its second question presented. The Sixth Circuit did not endorse yielding a judicial determination to the jury. Rather, it recognized that on *this* record, in *this* case, with testing by Ford's own engineers, reliability could be assessed without Dr. Richardson's recreation of Ford's tests. Thus, the Sixth Circuit noted that the district court in this case possessed the discretion to determine whether Dr. Richardson's alleged failure to conduct his own tests was relevant to the admissibility (i.e., reliability) of that testimony, or simply to the weight to be accorded the testimony by the jury. Pet. at 8a.

As with Ford's effort to conjure a conflict with reference to a limited and distinguishable case, its determination to separate itself from the tests of its own engineers and its misinterpretation of the Sixth Circuit's application of *Kumho Tire* fail to raise a significant issue for this Court's review.

III. CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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